INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Bork Mfg. Co. v. *Federal Trade Commission*, 194 F. 2d 611 — 9

Chas. A. Brewer & Sons v. *Federal Trade Commission*, 158 F. 2d 74 — 10

Chicago Silk Co. v. *Federal Trade Commission*, 90 F. 2d 689, certiorari denied, 302 U. S. 753 — 7

Consolidated Manufacturing Co. v. *Federal Trade Commission*, 199 F. 2d 417 — 9

Federal Trade Commission v. *Keppel & Bros.*, 291 U. S. 304 — 6, 7, 8, 9

Federal Trade Commission v. *Klesner*, 280 U. S. 19 — 6

Federal Trade Commission v. *A. McLean & Son*, 84 F. 2d 910, certiorari denied, 229 U. S. 590 — 7

Federal Trade Commission v. *F. A. Martoccio Co.*, 87 F. 2d 561, certiorari denied, 301 U. S. 691 — 7

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643 — 8

Federal Trade Commission v. *Raladam Co.*, 316 U. S. 149 — 8

Federal Trade Commission v. *Winsted Hosiery Co.*, 258 U. S. 483 — 9

Gay Games, Inc. v. *Federal Trade Commission* (C. A. 10), decided April 14, 1953 — 10

Globe Cardboard Novelty Co. v. *Federal Trade Commission*, 192 F. 2d 444 — 9, 10

Hamilton Manufacturing Co. v. *Federal Trade Commission*, 194 F. 2d 346 — 10

Helen Ardelle, Inc. v. *Federal Trade Commission*, 101 F. 2d 718 — 7

Hill v. *Federal Trade Commission*, 124 F. 2d 104 — 7

Hofeller v. *Federal Trade Commission*, 82 F. 2d 647, certiorari denied, 299 U. S. 557 — 7

Jaffe v. *Federal Trade Commission*, 139 F. 2d 112, certiorari denied, 321 U. S. 791 — 7

Johnson Candy Co. v. *Federal Trade Commission*, 78 F. 2d 717 — 7

261291—53——1

Cases—Continued Page

Koolish v. *Federal Trade Commission*, 129 F. 2d 64, certiorari denied, 317 U. S. 683 7

Kritzik v. *Federal Trade Commission*, 125 F. 2d 351 7

Lee Boyer's Candy v. *Federal Trade Commission*, 128 F. 2d 261 7

Lichtenstein v. *Federal Trade Commission*, 194 F. 2d 607, certiorari denied, 344 U. S. 819, rehearing denied, 344 U. S. 882 10

Loughran v. *Federal Trade Commission*, 143 F. 2d 431 7

Mintner v. *Federal Trade Commission*, 102 F. 2d 69 7

Modernistic Candies, Inc. v. *Federal Trade Commission*, 145 F. 2d 454 ..... 6, 7

National Candy Co. v. *Federal Trade Commission*, 104 F. 2d 999, certiorari denied, 308 U. S. 610 7

Osller Candy Co. v. *Federal Trade Commission*, 106 F. 2d 962, certiorari denied, 309 U. S. 675 7

Scientific Mfg. Co. v. *Federal Trade Commission*, 124 F. 2d 640 10

United States v. *Halseth*, 342 U. S. 277 8

U. S. Printing & Novelty Co. v. *Federal Trade Commission*, (C. A. D. C.), decided June 4, 1953 10

Wolf v. *Federal Trade Commission*, 135 F. 2d 564 7

Zitserman v. *Federal Trade Commission*, 200 F. 2d 519 .. 9, 10, 11

Statute:

Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45:

Section 5 2

Miscellaneous:

S. Rep. No. 221, 75th Cong., 1st Sess., p. 2 8

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 74

BERNICE FEITLER AND IRWIN FEITLER, INDIVIDUALLY AND TRADING AS GARDNER & COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 144) is reported in 201 F. 2d 790.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1953 (R. 154–155), and a petition for rehearing, filed on Feburary 16, 1953, was denied on February 19, 1953 (R. 155). The petition for a writ of certiorari was filed on May

gift enterprise, or lottery scheme, and contain on their face instructions printed in accordance with customers' specifications which explain how the cards and boards are to be so used. (R. 28–29.)

A purchaser who "punches" the card or board separates a disc or printed slip, and discloses a previously concealed number. Certain specified numbers entitle purchasers to designated articles of merchandise without additional cost, and this merchandise is obtained for much less than its normal retail price. Persons who do not secure a winning number receive nothing for their money other than the privilege of making the push or punch. Articles of merchandise are thus distributed to the public wholly by lot or chance. The "only use" to be made of the boards and cards, except when they are used for gambling, is in combination with other merchandise so that such merchandise can be sold "by means of lot or chance." (R. 29–30.)

Many sellers and distributors of merchandise, such as candy, cigarettes, clocks, razors, cosmetics, and clothing, have purchased petitioners' cards and boards and distributed assortments of merchandise, together with such cards, to retail dealers, who have sold such merchandise to the public by the use of such cards and boards. Thus, petitioners have placed in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the public sale and distribution of merchandise. (R. 30–31.)

Members of the purchasing public have been induced to trade with retail dealers selling or distributing merchandise through push cards and punch boards. Competitors of such retail dealers are faced with the alternative of also using such devices in their business, or suffering the loss of substantial trade. Manufacturers, wholesalers, and jobbers who do not use push cards and punch boards in connection with the sale of their merchandise to retailers often have their sales and potential sales diverted to those who use such devices. (R. 31–32.)

The Commission concluded that the sale of merchandise through the use of push cards or punch boards is a practice which is contrary to an "established public policy" of the United States Government and is "in violation of criminal laws," and constitutes "unfair acts and practices" under the Federal Trade Commission Act (R. 32). The Commission ordered petitioners to cease and desist from selling or distributing in commerce push cards, punch boards, or other lottery devices which "are to be used or may be used" in the sale or distribution of merchandise to the public "by means of a game of chance, gift enterprise or lottery scheme" (R. 25).

ARGUMENT

1. Petitioners contend (Pet. 16–18, 33–36) that the "specific and substantial" public interest which the Act requires to justify the filing of a

complaint, cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 28, precludes the Commission from proceeding against practices which contravene generally accepted business standards, and limits it to preventing practices which are unfair to purchasers or competitors. We submit, however, that the Act clearly empowers the Commission to proscribe the unfair practices involved in this case.

In *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304, this Court sustained a Commission order directed against interstate sales of "break and take" candy, arranged so that the retail purchaser of penny candy might, depending upon chance, get his money back or a prize, or pay a higher or lower price for his purchase. The Court stated that under the Act there was no essential difference between the use of chance as a sales appeal and the use of deception through misleading labeling; that devices whereby the amount of return for one's money depends upon chance have "met with condemnation throughout the community," and have long been "deemed contrary to public policy"; and that to hold that such practices were not "unfair" under the Act would be a "gross perversion of the normal meaning of the word." 291 U. S. 313. Cf. *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454 (C. A. 7), where the court, in sustaining a Commission order directed against the sale of chewing gum through punchboards, stated

(p. 455): "It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce."

Since the *Keppel* case, Commission orders directed against interstate sales of products and devices designed to promote retail sales by appeal to customers' gambling instincts have been unanimously sustained by the various courts of appeals.[1]

At the time of the *Keppel* case, the Act prohibited only "unfair methods of competition," and to establish a violation it was necessary to

[1] *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C. A. 7), certiorari denied, 299 U. S. 557; *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910 (C. A. 7), certiorari denied, 299 U. S. 590; *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C. A. 8), certiorari denied, 301 U. S. 691; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689 (C. A. 7), certiorari denied, 302 U. S. 753; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C. A. 7), certiorari denied, 308 U. S. 610; *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (C. A. 10), certiorari denied, 309 U. S. 675; *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64 (C. A. 7), certiorari denied, 317 U. S. 683; *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C. A. 7), certiorari denied, 321 U. S. 791; *Johnson Candy Co.* v. *Federal Trade Commission*, 78 F. 2d 717 (C. A. 7); *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C. A. 9); *Minter* v. *Federal Trade Commission*, 102 F. 2d 69 (C. A. 3); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C. A. 5); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351 (C. A. 7); *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C. A. 9); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564 (C. A. 7); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C. A. 8); and cases cited in note 3, *infra*, pp. 9–10.

show that the unfair methods were injurious to competitors, although a showing of specific losses to particular competitors was not required. *Federal Trade Commisison* v. *Raladam Co.*, 283 U. S. 643; *id.*, 316 U. S. 149, 152. The Commission's power to prohibit "unfair or deceptive acts or practices," which was added to Section 5 by the Wheeler-Lea Act (52 Stat. 111) in 1938, authorizes the Commission to stop practices "unfair or deceptive to the public generally, * * * regardless of their effect upon competitors." S. Rep. No. 221, 75th Cong., 1st Sess., p. 2. The "unfair" practices which the amended Act prohibits are at least as broad in scope as the "unfair" methods of competition proscribed by the original statute. Clearly, it is an unfair practice to distribute merchandise at retail to the public through a game of chance—a practice which has long been "deemed contrary to public policy." *Federal Trade Commission* v. *Keppel & Bro., supra.*

Petitioners apparently contend that because the retail distribution of merchandise by means of their punch boards involved solely intrastate transactions, the Commission had no power to prohibit interstate sale of the boards.[2] But "sell-

[2] Petitioners frame this argument in terms of the absence of any Federal public policy against the intrastate distribution of merchandise through games of chance (Pet. 19–24). In support of this contention, they cite *United States* v. *Halseth*, 342 U. S. 277. The *Halseth* case does not aid petitioners. It held only that 18 U. S. C. 336, which prohibits mailing material "concerning any lottery," refers to an

ing in interstate commerce the means or instrumentalities by which merchandise can or may be sold by games of chance, gift enterprise or lottery is an unfair method of competition." *Zitserman* v. *Federal Trade Commission,* 200 F. 2d 519, 522 (C. A. 8). In *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, a manufacturer used labels which tended to deceive a substantial part of the consuming public, but not the dealers to whom the manufacturer sold. This Court, holding that such a practice was an unfair method of competition under the Act, pointed out (p. 494) that it had long been a part of the law of unfair competition that a person is a wrongdoer who "furnishes another with the means of consummating a fraud." In the *Keppel* case, *supra,* the retail sales of the "break and take" candy were intrastate transactions; it was the interstate distribution of such candy, which made the unfair retail sales possible, that constituted the unfair method of competition.

Following the clear principles outlined above, the courts of appeals for six circuits have sustained without dissent the application of the Act to the interstate sale of punchboards used in the retail distribution of merchandise,[3] and this

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existing lottery, and that the mere mailing of punch boards and instructions is not a violation of that Section.

[3] *Bork Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 611 (C. A. 9); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444 (C. A. 3); *Consolidated Manufacturing Co.* v. *Federal Trade Commission,* 199 F. 2d

Court recently denied certiorari in one of those cases involving an order substantially the same as that in the instant case.[4]

Petitioners err in contending (Pet. 38–40) that the decision below is in conflict with *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (C. A. 3). In that case the court held that the sale of pamphlets which attacked aluminum cooking utensils on health grounds was not an unfair practice, even though nonaluminum cooking utensil distributors had utilized the pamphlets. In *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444, which is in accord with the decision below, the Court of Appeals for the Third Circuit distinguished its earlier decision. It pointed out that the function of the pamphlets in the *Scientific Mfg.* case was to disseminate the opinions of their author, and their use in connection with the sale of nonaluminum merchandise was a "clear perversion" of their primary function. On the other hand, the punchboards in *Globe Cardboard,* like those of petitioners here, were "designed for the specific

417 (C. A. 4); *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74 (C. A. 6); *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519 (C. A. 8); *Gay Games, Inc.* v. *Federal Trade Commission*, (C. A. 10, April 14, 1953); *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C. A. D. C.); *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, (C. A. D. C., June 4, 1953).

[4] *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C. A. 9), certiorari denied, 344 U. S. 819, rehearing denied, 344 U. S. 882.

purpose of selling merchandise by lottery." 192 F. 2d at 447.

2. Petitioners argue (Pet. 36–38) that they were denied a fair hearing because they were not allowed to offer additional evidence that their punchboards were used as educational games. After extensive hearings, during which petitioners admittedly introduced "some evidence" on this issue (Pet. 37), petitioners requested that further hearings be held in thirteen states (R. 35–37). The examiner denied the request, but stated that further hearings would be had in any area in which petitioners' customers had been shown to have sold merchandise through punchboards (R. 36).

We submit that the court of appeals correctly held (R. 147, 150) that petitioners were not prejudiced by this ruling.[5] For it is clear that the examiner did not abuse his discretion in declining, after the Commission had introduced extensive evidence relating to "conditions existing in fairly well defined territory," to conduct further protracted hearings relating to "conditions existing in other and far remote territory" (R. 35). Petitioners made no specific offer of proof that their boards were used as educational games, and their proffered evidence that the boards were operated

[5] The printed record does not contain the rulings of the examiner to which petitioners except. Cf. *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, 521 (C. A. 8). However, portions of the rulings are set forth in a petition to reopen the proceedings (R. 33–37), which the Commission denied (R. 62–63).

in taverns and poolrooms, and were played to satisfy a gambling instinct (R. 148), would hardly be probative of such use. Nor would the additional evidence have supported petitioners' contention that the Commission had no jurisdiction over their practices (R. 150). As the court of appeals stated, the Commission's jurisdiction "does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon the single fact that these devices, unlike most other gambling devices, are used as a means of selling or distributing merchandise which is opposed to the public policy of the United States" (R. 149).

CONCLUSION

The decision below is clearly correct, no question of general importance is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General.
WILLIAM T. KELLEY,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 74

BERNICE FEITLER and IRWIN FEITLER, Individually and Trading as GARDNER & COMPANY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition for Rehearing

GEORGE E. LINDELOF, JR.,
215 West Seventh Street,
Los Angeles, California,
Attorney for Petitioners.

Of Counsel:
F. W. JAMES,
9448 Drake Avenue,
Evanston, Illinois.

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vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

This petition is based on two grounds: (1) that the order sustained by the Court below is in conflict with the order sustained in the case of *Hamilton Manufacturing Co.*

v. *Federal Trade Commission*, 194 F. (2d) 346; (2) that the order in the case at bar violates the policy laid down by Congress that the Federal Government should not unduly interfere with the police powers of the States.

Taking up the first ground. The Circuit Court of Appeals for the District of Columbia in the *Hamilton* Case, *supra*, holds that the order issued in the case at bar is too indefinite. The Court in the *Hamilton* Case therefore modified the order so that the Hamilton Company is only restrained from shipping boards which are designed or intended to be used for the distribution of merchandise; while on the other hand, these petitioners are restrained from shipping punch boards in interstate commerce which are to be used or *which may be used* to distribute merchandise. It is self-evident from the above that it is an unwarranted discrimination to restrain one concern from shipping punch boards in interstate commerce which may be used to distribute merchandise, while his competitor shipping identical punch boards is only restrained from shipping boards which are designed or intended to be used for the distribution of merchandise. Such a discrimination clearly violates the due process clause of the Fifth Amendment to the Constitution.

Concerning the second ground. The construction placed upon the Federal Trade Commission Act by the Court below is clearly violative of the policy laid down and adhered to by Congress that Congress will not interfere with strictly intrastate affairs. For this reason it seems to the petitioners that the intrastate use of punch boards to distribute merchandise cannot be used as a basis for the *inference* that Congress by the passage of the Federal Trade Commission Act intended to give the Commission jurisdiction to stop the interstate shipment of punch boards which are to be used in intrastate transactions to dis-

tribute merchandise. This is especially true when it is borne in mind that many States and sub-divisions thereof have expressly legalized such use of punch boards. This interpretation of the statute amounts to saying that Congress has said to the States that no matter whether a State or sub-division thereof has placed its stamp of approval upon the use of punch boards to distribute merchandise Congress nevertheless characterizes such transactions as being of such a nature that they must be prohibited or that Congress will use every means within its power to stop such transactions. Congress has never intended to so characterize a strictly intrastate transaction.

This interpretation of the statute also violates Congress's avowed policy that when Congress wishes to stop the interstate shipment of any merchandise because of its detrimental intrastate effect Congress has always done so by an express and unequivocal enactment.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to it for review of the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

GEORGE E. LINDELOF, JR.,
Attorney for Petitioners.

F. W. JAMES,
Of Counsel.

CERTIFICATE.

Comes now the undersigned, one of the attorneys for the petitioners herein and hereby certifies that this Petition is presented in good faith and is not interposed for delay and further certifies that this Petition is restricted to a ground available to the petitioners although not previously presented.

F. W. JAMES.